Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-893

IN THE

Supreme Court of the United States

October Term, 1992

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY and CONSOLIDATED GROUP, INC.,
Petitioners,

vs.

RICHARD FUGARINO, JO MARIE FUGARINO, and MARC A. FUGARINO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

A. Statement of the Facts

The question in this case is whether or not Title I of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), 29 U.S.C. §§1001, *et seq.*, preempts state law claims brought by and on behalf of a sole proprietor against the insurance company issuing a health insurance policy purchased by the sole proprietor. Respondent, Richard Fugarino owned and operated an

unincorporated business known as "The Glen's Restaurant". This business had always been operated as a sole proprietorship. At no time was the business incorporated.

In 1985, Mr. Fugarino purchased an insurance policy from an independent insurance agent. This policy was issued by Petitioner, The Hartford Life and Accident Insurance Company ("Hartford"), and administered by Petitioner, Consolidated Group, Inc. ("Consolidated"). The policy provided health and medical insurance coverage to Mr. Fugarino, his dependents and some of his restaurant employees.

In February 1988, Mr. Fugarino's seventeen (17) year old son, Marc Fugarino, was involved in a severe automobile accident which left him a paraplegic. In the year following the accident, several disputes arose regarding Marc Fugarino's medical claims which had been submitted for payment pursuant to the terms of the insurance policy. The failure to resolve these disputes lead to the filing of a lawsuit in the Court of Common Pleas, Summit County, Ohio, in 1989.

Respondents sought compensatory and punitive damages for alleged bad faith by the Petitioners in their handling of Marc Fugarino's medical claims and certain of the Respondents' employees. Respondents also sought a declaratory judgment that the insurance contract was in full force and effect; that the Petitioners are responsible for payment of all past and future medical bills incurred by the Respondents and for a determination of their rights under the insurance policy.

Certain Counts contained in the Complaint were subsequently dismissed by agreement of the parties.[1]

On March 20, 1989, Petitioners removed the case to the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C. §§1441 & 1446, claiming exclusive federal jurisdiction under ERISA.

On April 27, 1989, Petitioners filed a Motion to Dismiss Petitioners' Complaint on the grounds that Respondents' claims arise under ERISA and were prematurely filed because Respondents had failed to follow administrative remedies provided under ERISA and the insurance policy itself.

Respondents filed a Motion in Opposition to the Motion to Dismiss, contending that ERISA was not applicable and that all administrative remedies had been exhausted prior to the filing of the Complaint.

On August 3, 1989, Respondents filed a Motion To Remand to state court pursuant to 28 U.S.C. §1447(c). The basis for the Motion To Remand was that no federal question was raised, removal jurisdiction did not exist, ERISA was not applicable and Respondents were not proper parties to bring an ERISA action even if ERISA was applicable.

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[1] Remaining before the Court, were causes of action seeking damages against Petitioners as a result of Petitioners' actions in handling Respondents' claims submitted under the terms of the insurance policy. Furthermore, Respondents' request for a determination of their rights and Petitioners' obligations under the insurance policy was not dismissed. Specifically, Respondents alleged that Petitioners were obligated to cover the tremendous amount of medical bills and expenses expected to be incurred on behalf of Marc Fugarino as a result of the injuries he incurred while the insurance policy was in effect.

B. Decisions of the Courts Below

On June 4, 1991, more than two (2) years after Respondents' Motion to Dismiss was filed, the District Court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (Pet. App. C at 25a).

The District Court granted Petitioners' motion, not on the grounds that Respondents failed to exhaust administrative remedies as raised in Petitioners' motion, but instead found that Respondents' claims were not actionable due to ERISA pre-emption. In reaching this conclusion, the District Court, relying upon 29 U.S.C. §1001, *et seq.*,[2] stated that two issues must be addressed in order to determine whether or not the case would be remanded back to the state court or resolved in the District Court (Pet. App. C at 22a).

The first issue was whether the insurance contract in question was a plan governed by ERISA. Secondly, the court must determine whether or not Respondents were participants in such plan within the meaning of ERISA (Pet. App. C at 22a). The District Court went on to state that "[i]f Plaintiffs prove that they were not participants under ERISA, then this case must be remanded back to state court to resolve the remaining issues." (Pet. App. C at 20a).

In finding that an ERISA plan had been established, the Court applied the test set out in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (Pet. App. C

[2] The District Court stated that "[a] specific plan or program will be governed by ERISA if the plan or program covers **participants because of their employee status in an employment relationship**, and an employer or employee organization is the person that establishes the plan or program." (Pet. App. C at 22a). Emphasis added.

at 22a-23a). However, the District Court merely took for granted or assumed that the Fugarinos were participants without providing any discussion or basis for its finding.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed with the District Court's finding that the insurance policy purchased by Mr. Fugarino constituted an Employee Welfare Benefit Plan ("EWBP") covered by ERISA, as to his employees (Pet. App. A at 11a).

However, the Sixth Circuit specifically addressed the question, not discussed by the District Court, of whether or not the Fugarinos were "participants" or "beneficiaries" as defined by ERISA. The Sixth Circuit found that Mr. Fugarino and his dependents were not "participants" or "beneficiaries" as those terms are defined by ERISA §3(7)-(8), 29 U.S.C. §1002(7)-(8), and therefore, not an ERISA plan as to Respondents. Thus, they "may sue under and seek the broader relief provided by state tort law" (Pet. App. A at 12a-13a). The case was reversed and remanded to the District Court with instructions to remand Plaintiffs' remaining claims to state court for further proceedings (Pet. App. A at 13a & 15a).

In reaching this conclusion, the Court of Appeals relied upon the plain language of the Act, its express purpose, well established case law, and the class of individuals the Act was designed to protect.

On August 24, 1992, the Sixth Circuit Court denied Petitioners' Petition for Rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The Sixth Circuit's decision is not exceptionable in its construction of those terms contained in ERISA. The decision below applies the well-grounded rules of statutory construction in a consistent, rational, and judicious manner. Petitioner does not contend that the Sixth Circuit failed to follow the well accepted rules of statutory construction, nor that the Sixth Circuit improperly applied these rules. Rather, Petitioner seeks to construe ERISA in a manner which is completely at odds with the intent and purpose of the Act which is to protect employees from employer abuses. An exercise of this Court's certiorari jurisdiction would serve no constructive purpose and should not be granted.

The decision of the Sixth Circuit does not conflict with decisions of this Court and other federal circuit courts of appeal, and therefore, is not worthy of certiorari.

The Court of Appeals decision reflects a clear understanding of the purposes of ERISA and its decision is consistent with the express intent of Congress as set out in the Act. Furthermore, the decision below is consistent with this Court's articulation of that purpose.

Finally, no important federal question is presented that would warrant further consideration by this Court.

A. The Court Below Did Not Err In Determining That Sole Proprietors, Partners, And Corporate Owners Cannot Be "Participants" In ERISA Plans When They Are Covered By Such Plans.

Petitioners first request this Court to revisit a long line of cases which clearly and consistently reiterate the purpose and intent of ERISA. Petitioners challenge to the Sixth Circuit's decision is that the Court misinterpreted the basic provisions of ERISA, misunderstood the purpose of the Act and contravenes Congressional intent in rendering its decision (Pet. at 7).

However, their argument ignores the clear expression of the *intent and purpose* of ERISA, as set out by Congress in 29 U.S.C. §1001 (a) & (c) entitled "Congressional Findings and Declaration of Policy".

Specifically, §1001 states that ERISA was enacted for the protection of "*employees and their beneficiaries*,. . ."; in order to protect "the interests of *participants* in employee benefit plans and *their beneficiaries*, . . ." (App. at _____), 29 U.S.C. §1001(a) & (c) (Emphasis Added).

Furthermore, this Court and other circuit courts of appeal have consistently found that ERISA was enacted for the benefit of *employees and their beneficiaries*. (*See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Giardono, et al. v. Jones*, 867 F.2d 409 (7th Cir. 1989)).

In *Shaw*, 463 U.S. 85, 90, this Court stated that:

> "Erisa is a comprehensive statute designed to promote the interests of *employees* and *their beneficiaries* in employee benefit plans." (Emphasis added).

See also Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981); *Morash*, 490 U.S. 107.

This exhaustive analysis of the purpose and intent of ERISA by this Court leaves no doubt that ERISA was designed to protect employees and their beneficiaries from employer abuses. Respondents have not found any decision by this Court which determines that ERISA was intended for the protection of employers. The Sixth Circuit's decision is consistent with Congressional intent.

The intent and purpose of ERISA clearly reflects the concerns of Congress in protecting *employees* and *their beneficiaries*, not employers. Moreover, there can be no doubt that, under ERISA, employees and employers are meant to be two different classes of individuals. The definition of beneficiary as one entitled to benefits **because** of his or her relationship to an employee is consistent with the Act and the Sixth Circuit's decision is consistent with that premise.

Acceptance of Petitioners' interpretation of "beneficiary", as used in ERISA, to include an employer is inconsistent with Congressional intent to protect employees from employer abuses. Moreover, the inclusion of an employer in the definition of beneficiary clearly adds a new class of individuals, not provided for by ERISA, who have standing to enforce ERISA remedies. *See Shaw*, 463 U.S. at 90.

Congressional intent, case law, and the provisions of ERISA itself, clearly reflect that the fundamental purpose of ERISA is to protect the interests of employees and their beneficiaries. Clearly, the Sixth Circuit's ruling that a sole proprietor can not be a "beneficiary" is consistent with the express purpose and intent of ERISA, which is to provide *employees*

protection from *employer* abuses. Any other interpretation would not only be inconsistent with the express language of the Act, but would render meaningless Congressional policy declarations as set out in 29 U.S.C. §1001.[3]

Petitioners further suggest that the Sixth Circuit's decision dated July 8, 1992, ignored a Department of Labor opinion letter dated July 31, 1992 (Pet. App. E at 27a-28a, Pet. at 9). While a Department of Labor Opinion Letter can provide guidance to the federal courts, they are not binding. *Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167-1168 (11th Cir. 1988).

This Court should not exercise its discretionary jurisdiction because Petitioners feel their definition of *employee* is better, or should be applied, rather than that found in ERISA itself, and in 29 C.F.R. §2510.3-3(c).

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[3] Petitioners' assertion that the Sixth Circuit misapplied 29 C.F.R. 2510.3-3(a) (Pet. at 9-12), is not supported by that Court's decision. The Sixth Circuit specifically addressed the issues Petitioner contends it ignored or erroneously applied in its decision (Pet. App. A at 12a-13a).

B. The Decision Below Is Not At Odds With Prior Decisions Of This Court And Of Other Circuit Courts Of Appeal.

Petitioners' attempt to place the Sixth Circuit's decision at odds with other decisions of this Court and other circuit courts of appeal falls short. Petitioners have failed to cite any decision of these courts inconsistent with the decision of the Sixth Circuit in this case.[4]

On the contrary, there are decisions of this Court that, although do not address the specific issues of this case, would suggest that the Sixth Circuit's decision is consistent with this Court and other Circuit's interpretation of ERISA. *See Nationwide Mutual Insurance Co., et al. v. Darden*, 112 S. Ct. 1344 (1992), where this Court found that an independent contractor was not an employee for purposes of ERISA.[5]

Moreover, several Circuits have held that employers are not participants within the meaning of ERISA and therefore not entitled to bring an action under ERISA. *See Kivatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989); *Giardono,*

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[4] Petitioners cite *Harper v. American Chambers Life Insurance Co.*, 898 F.2d 1432 (9th Cir. 1990), in support of their contention that Respondents are beneficiaries under ERISA. However, this case was appealed from the District Court's grant of summary judgment only on the issue of whether or not an ERISA plan had been established. In reversing the District Court's dismissal of the complaint, the Eleventh Circuit stated "[t]he district court apparently decided that as a matter of law the . . . policy was an ERISA plan." *Id.* at 1433.

[5] Respondents do, however, direct this Court's attention to a case out of the Texas Supreme Court, *Forbau v. Aetna Life Insurance Co.*, No. D-1235 (Tex. Nov. 4, 1992) (available on WESTLAW, 1992 WL316493 (Tex.)). However, this case held that a dependent of a corporate shareholder could maintain an action under ERISA as a beneficiary. It did not address the question of whether or not a sole proprietor was a participant or beneficiary under ERISA.

867 F.2d 409; *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981);[6] *Swartz v. Gordon*, 761 F.2d 864 (2d Cir. 1985); *Donovan*, 688 F.2d 1367.

Petitioners' contention that the Court of Appeals' decision in this case will create inconsistency in implementing ERISA is unfounded and unsupported.

Petitioners further contend that:

> "[n]umerous other decisions provide further support for a strict dichotomy between ERISA and non-ERISA plans. With respect to the former, all benefit remedies (including those of employers) are governed by ERISA." (Pet. at 16).

In support of this statement, Petitioners cite *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991). In this case, the Eleventh Circuit found that an ERISA plan covering only one employee had been established. These cases did not consider whether an employer could pursue ERISA remedies on his own behalf under ERISA. In fact, the Eleventh Circuit found that although only **one** plan had been created, one of the employee's four claims did not concern ERISA benefits and, therefore, must be pursued in state court. *Id.* at 1550.

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[6] Petitioners acknowledge these three cases as holding that employers are not "participants", however, attempts to distinguish them on the basis that they all deal with plans jointly administered by management and Unions, or so-called "Taft-Hartley plans". Thus, Petitioners reason, "the results in these cases *could* be sustained through application of the independent requirements of the LMRA . . ." (Pet. at 15, fn. 9) (Emphasis added). However, Petitioners' contention disregards the plain fact that all of these cases involved pension plans subject to ERISA. Moreover, the respective Courts of Appeal relied upon ERISA in reaching their decisions.

The Appellant in *Williams*, 927 F.2d 1540, was an employee who brought several claims against his employer, some pursuant to ERISA and others under state law. The District Court had dismissed all of Appellant's ERISA claims finding that an ERISA plan had not been established. Appellants state law claims were dismissed based upon various state law doctrines, not ERISA. The Eleventh Circuit found that an ERISA plan had been established and that one of Appellants state law claims was not pre-empted by ERISA. The apparent basis for this is that the particular claim survived ERISA pre-emption because the underlying benefits themselves were not covered by ERISA. Even so, the Court held that only one plan had been established and that Appellant had actionable remedies under that plan pursuant to both ERISA and state law.

C. The Sixth Circuit's Decision Is Consistent With Clearly Expressed Congressional Intent, And Will Not Create Disruption, Confusion, And Unnecessary Expense In The Implementation Of ERISA.

Petitioners contend that the Sixth Circuit's decision will create disruption, confusion and unnecessary expense in the implementation of ERISA. This argument is based upon their contention that the decision will provide different remedies to persons covered under an ERISA plan depending upon whether they are an employee or employer.

However, this contention skirts the Sixth Circuit's decision which found that Respondents' insurance policy, in so far as concerns Respondent and his dependents, did not constitute an ERISA plan. Furthermore, Respondents maintain that the converse is true.

In a situation where a self-employed person purchases a health and medical insurance plan for himself and his beneficiaries only, ERISA will not apply. But, once the employer adds an employee to that very same plan, he loses his ability to seek state law remedies and is confined to ERISA remedies only. Surely this is not what Congress intended when it enacted ERISA. On the contrary, the conversion of an employer's remedies under a health insurance contract subject to state law to an ERISA plan subject to ERISA, merely by including an employee in the plan, will result in more confusion to both state insurance agencies and employers.

Petitioners' attempt to align the Sixth Circuit's decision with the concerns raised by this Court in *Darden*, 112 S. Ct. 1344. However, the concern this Court expressed in *Darden* about the problems an

employer would have in determining who are employees and what pension fund obligations the employer may owe to whom will not result from the Sixth Circuit's decision.

In *Darden*, this Court expressed these concerns in the context of the uncertain test used by the Fourth Circuit in determining whether an individual was an employee or independent contractor. The Fourth Circuit's resolution of that question would turn on the nature and extent of the individual's "reliance" upon his expectation of benefits. No such problems will result from the decision below because the question of whether an individual is an "employee" or "employer" is clear and can be determined without extensive inquiry into subjective and varying facts.

In *Darden*, this Court suggested that normal agency principles should ordinarily be sufficient to determine who is an employee and who is an independent contractor. A similar approach has been taken here. No special rules or tests will be necessary to distinguish who is an employee and who is the employer for purposes of ERISA.

CONCLUSION

Based upon the above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

29 U.S.C. §1001

§1001a. Additional Congressional findings and declaration of policy

(a) Effects of multiemployer pension plans

The Congress finds that—

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

* * *

(c) Policy

It is hereby declared to be the policy of this Act—

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employer benefits under multiemployer plans.